United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 26, 2010

TO : Wayne Gold, Regional Director

Region 5

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Sheraton Columbia Hotel

Case 5-CA-35324

This case, which arises from the nationwide UNITE HERE dispute, was submitted for advice to determine whether the Employer violated Section 8(a)(5) by holding withheld dues in escrow and not remitting them to the Mid-Atlantic Regional Joint Board.

We conclude that UNITE HERE has been, and continues to be, the exclusive Section 9(a) representative of the Employer's employees. Therefore, the Employer did not violate Section 8(a)(5) because it had no obligation to bargain with or remit dues to the Joint Board after it disaffiliated from UNITE HERE.

FACTS

The Blackstone Group is an asset management business and financial service provider that has a division that owns hotel properties. In early spring 2007, the General President of UNITE HERE, Bruce Raynor, had communications with the Blackstone Group regarding possible card check/neutrality agreements to cover some of its hotels. In connection with this effort, Raynor contacted Harold Bock, who served as both Vice President of UNITE HERE and Regional Director for the Mid-Atlantic Regional Joint Board (Joint Board). UNITE HERE paid his entire salary. Raynor told Bock that he was working on getting card check agreements at some hotels owned by Blackstone Hotel Properties. He told Bock that one of the Blackstone-owned properties, the Sheraton Columba Hotel (the Employer), was in his region and instructed him to contact Blackstone's representatives to "work out something" related to that hotel.

In March 2007, Bock went to New York and met with Blackstone representatives in charge of its hotel division. During the meeting, the Blackstone representatives asked Bock who would be doing the organizing, who would negotiate the contract, and who would service the contract? They stated that they did not want the UNITE HERE organizing team to be involved; that they had worked with them before and did not want to again. They also stated that they did not want to deal with Local 7 or Local 25 of UNITE HERE. They specifically named a representative, who had previously been, and is now again, the president of UNITE HERE Local 7, stating they did not want her organizing the location, nor did they want another particular representative, who is affiliated with UNITE HERE Local 25, to serve as the business agent. Bock told them that the Joint Board would organize the facility, he personally would negotiate the contract, and that he would assign one of the Joint Board's representatives to service the contract. The parties reached a handshake agreement at that time; they did not sign a neutrality agreement.

In early March 2007, Bock assigned Teresa Engleman, Assistant to the Regional Director of the Joint Board, to organize the employees at the hotel. She then assigned two of the Joint Board's staff people to assist her, along with a volunteer organizer employed in another unit. No representative of UNITE HERE, other than Bock, was involved in the organizing campaign; nor did UNITE HERE provide any funding for the organizing campaign.

Engleman and the others began soliciting authorization cards. The cards named UNITE HERE as the union that would represent the employees. During the organizing campaign, Engleman explained to employees how the union was structured, that they would become part of the Joint Board, and "if the organizing campaign was successful, and the employees selected UNITE HERE to represent them for collective bargaining, then a local would be created for them."

In early April 2007, Bock contacted the Employer to inform it that a majority of the employees had signed authorization cards. The parties signed a recognition agreement on May 3, 2007, following a card check. The agreement names UNITE HERE as the union and is signed by Bock on behalf of UNITE HERE. The recognition agreement states in pertinent part:

This Agreement is entered into by and between the Blackstone Group for the Sheraton Hotel, Columbia, Maryland (the "Employer") and UNITE-HERE (the "Union" . . .

After the parties signed the recognition agreement, Bock contacted the Employer to arrange contract negotiations. Bock led the negotiations for the Union. The parties met for approximately four or five days before reaching an agreement. The contract is effective from June 5, 2007 through June 4, 2010. During negotiations, the parties discussed how the Union should be named in the contract and they agreed that it would be "UNITE HERE (Mid Atlantic Regional Joint Board)". The parties also discussed where the Employer would send insurance funds, pension funds and membership dues. On July 27, 2007, Bock sent the Employer a letter that explained the procedure for withholding dues and remitting the funds. Afterward, the Employer began remitting dues to UNITE HERE at the Joint Board's address.

Soon after the contract was finalized, Bock assigned Joint Board staff representatives to service the contract, though he continued to provide assistance, as needed. On some unknown date, the employees at the hotel were assigned the Local number 658. Local 658 utilizes the model by-laws that are included in the Joint Board's constitution and represents only the Employer's employees. Local 658 does not have any officers but conducts meetings and has shop stewards elected by the membership. Other than Bock, no other UNITE HERE representative was involved in servicing the contract.

On March 7, 2009, the Joint Board voted to disaffiliate from UNITE HERE. 1 It later voted to join other disaffiliated joint boards and locals to form Workers United, which in turn affiliated with SEIU. In early April, the shop stewards circulated among the employees a petition indicating their support for the Joint Board's decision. In a unit of approximately 72 employees, 39 signed the petition. In late April, Engleman asked employees to sign a statement with the heading: "We are members of the Mid-Atlantic Regional Joint Board Local 658, Workers United/SEIU." Approximately 63 employees signed

 $^{^{1}}$ From this point forward, all dates are 2009, unless otherwise noted.

the statement. The Joint Board also solicited new dues checkoff authorization cards, which state:

I hereby accept membership in the Mid-Atlantic Regional Joint Board of Workers United, an affiliate of SEIU, and authorize the Mid-Atlantic Regional Joint Board to represent me in negotiations with my employer about wages, hours and all other conditions of employment. I authorize my employer, or its successor, to deduct from my wages, weekly, a charge equal to the dues Mid-Atlantic Regional Joint Board members pay, regardless of my membership status in the union, and to remit that charge to the Mid-Atlantic Regional Joint Board.

By August, all employees signed the new cards and the Joint Board submitted them to the Employer.

Since the disaffiliation, the Joint Board has continued servicing the contract. The Joint Board made a slight change to its dues structure, and otherwise there were no changes in its constitution or bylaws, or other internal union matters.

On March 24, for the first time, the Employer remitted withheld dues to the Joint Board at the same address it previously sent dues on behalf of UNITE HERE. The Employer again remitted withheld dues to the Joint Board on April 8, but, since then, it has escrowed all withheld dues.

Also after the disaffiliation, both UNITE HERE and the Joint Board sent letters to the Employer, each essentially asking it to disregard the other entity. UNITE HERE demanded that the Employer continue to recognize it as the bargaining representative of its employees.

By letter of May 18, the Employer informed Bock that it was uncertain as to which entity lawfully represented its employees and that it desired to comply with its legal obligations. It further stated:

To this end, until the dispute regarding the bargaining representative of the Hotel's employees is resolved (or until further notice), the Hotel will: (1) continue to administer the collective bargaining agreement applicable to

employees at the Hotel including making all pension and health and welfare payments to the same funds/plans as before; (2) escrow dues payments in an interest-bearing account; and (3) as historically has been the case, continue to work with representatives of the Mid-Atlantic Regional Joint Board, including Teresa Engleman (or your designee(s)) regarding contract administration matters . . . In particular, we would encourage you or any of the unions involved to obtain a formal legal decision from the National Labor Relations Board or a court which would establish definitively which union represents the bargaining unit employees at the Hotel.

The Joint Board filed this charge on October 6, alleging that the Employer violated 8(a)(5) by holding the withheld dues in escrow.

ACTION

We conclude that UNITE HERE has been, and continues to be, the exclusive Section 9(a) representative of the Employer's employees. Accordingly, the Region should dismiss the charge, absent withdrawal, because the Employer had no obligation to bargain with or remit dues to the Joint Board after the disaffiliation.

An employer's obligation to bargain extends only to the statutory representative selected by a majority of the unit employees.² While the Section 9(a) representative may delegate some authority to an agent to act on its behalf, it cannot delegate all its responsibilities to another union and demand that the employer bargain with that union.³

² See, e.g., <u>Nevada Security Innovations</u>, <u>Ltd.</u>, 341 NLRB 953, 955 (2004).

³ Compare Nevada Security Innovations, Ltd., 341 NLRB at 953, fn.1, 955-956 (employer violated Section 8(a)(5) by refusing to bargain with certified representative, the international, where the international had merely delegated some of its duties to its local); Mountain Valley Care & Rehabilitation Center, 346 NLRB 281, 282-283 (2006) (same); with Goad Co., 333 NLRB 677, fn.1, 679-680 (2001) (where Section 9(a) representative improperly sought to transfer all its representational responsibilities to its sister

The Board has found an improper delegation of representation where there had been a wholesale substitution of another union for the designated Section 9(a) representative.

At the same time, another union can acquire the status of a joint Section 9(a) representative based upon the parties' conduct. For example, in American Medical Response, the Board found that although the recognition agreement named only the international, the local was a joint representative where the local also was a party to the collective-bargaining agreement, the local maintained and enforced that agreement, the dues authorization cards identified the local as the bargaining representative, and both the local and the international were going to participate in upcoming negotiations. 6

local, the employer lawfully refused to bargain with the sister local).

⁴ See <u>Goad Co.</u>, 333 NLRB at 679-680 (agreement between Section 9(a) representative and its purported "agent" "stands the law of agency on its head" by absolving the principal for the actions of its own purported agent and confirmed that the principal was "bowing out" of its representational duties); <u>Sherwood Ford</u>, <u>Inc.</u>, 188 NLRB 131, 133-134 (1971) (resolution provided that Section 9(a) representative would carry out instructions of its purported agent, and "it was there that the switch became manifest, for the dog had now become the tail").

⁵ See, e.g., <u>Mail Contractors of America</u>, <u>Inc.</u>, 346 NLRB 164, 167 (2005) ("weight of the evidence" arguably established that international and local were recognized as joint representatives at first bargaining session, where contract language made both parties to the collective-bargaining agreement); <u>Tree-Free Fiber Co.</u>, 328 NLRB 389, fn.4, 397-98 (1999) ("longstanding past practice" established international and its two locals were joint collective-bargaining representatives where contract named two signatory locals in recognition clause but was also executed by International, contractual grievance procedure provided for international's involvement, and international historically participated in contract negotiations).

⁶ 335 NLRB 1176, 1178-79 (2001) (local and international both held liable as joint representatives for Section 8(b)(1)(A) and (2) violations based upon their extension of contract to employees improperly accreted into the bargaining unit).

Here, UNITE HERE has been, and remains the employees' Section 9(a) representative. The evidence establishes that, rather than supplanting UNITE HERE through an improper delegation of representational responsibilities, or even attaining joint representative status with UNITE HERE, the Joint Board was UNITE HERE's designated agent in servicing the bargaining unit on a day-to-day basis.

UNITE HERE's status as the Section 9(a) representative is demonstrated by the fact that UNITE HERE made the initial contact with the Employer to discuss card check agreements and it was UNITE HERE that instructed its vice president, Bock, to "work out something." Also, the authorization cards named UNITE HERE as the union that would represent the employees, and at least one organizer told employees that UNITE HERE would be their bargaining representative when she explained that, "if the organizing campaign was successful, and the employees selected UNITE HERE to represent them for collective bargaining, then a local would be created for them." UNITE HERE continued to maintain a presence during the organizing, negotiating, and the servicing of the contract through its paid officer employee, Bock. Significantly, although Bock also held a position as Director of the Joint Board, there is no evidence that he ever told the Employer or ever declared to the employees that he was not acting on behalf of UNITE HERE.

The manner in which Bock signed both the recognition agreement and the collective-bargaining agreement only bolsters this conclusion. The initial recognition agreement identified only UNITE HERE as the Union, and it is signed by Bock on behalf of UNITE HERE. Significantly, it names the Employer as "the Blackstone Group for the Sheraton Hotel, Columbia, Maryland." Thus, it is clear that if it was the intent of the parties to establish the Joint Board as the representative, or even as a joint representative, the parties were well aware of the contract language necessary to do so. Although the recognition clause in the contract named the Union as "UNITE HERE (Mid Atlantic Regional Joint Board)," the signature page identifies only UNITE HERE as the party agreeing to its terms, which Bock signed on behalf of UNITE HERE. The manner in which these key documents were signed would only reinforce the Employer's and employees' understanding that UNITE HERE was the 9(a) representative and that Bock was acting on behalf of it.

Moreover, the fact that the Joint Board handled the day-to-day administration of the contract does not undermine UNITE HERE's claim to 9(a) status given the delegation of authority given to the Joint Board through Bock. There is nothing about this delegation that indicates a desire by UNITE HERE to "bow out." Nor is there any affirmative action on the part of UNITE HERE to suggest such intent.

UNITE HERE also remained the 9(a) representative after the Joint Board disaffiliated. Granted, the employees and Employer continued to see the faces of Joint Board representatives in their day-to-day dealings with matters concerning the unit employees' terms and conditions of employment. However, as noted above, UNITE HERE had never abandoned its representational status, as it maintained a presence through its designation as the recognized union in the recognition agreement, in the contract, and continuing through the disaffiliation by its letter demanding that the Employer continue recognizing it and its affiliates as the bargaining representative of its employees. For this reason, we reject the Joint Board's claim that UNITE HERE relinquished its Section 9(a) status. To that end, the Employer has never clearly and unequivocally notified UNITE HERE that it intended to withdraw recognition from UNITE HERE, nor has the Employer placed UNITE HERE on notice that it intended to repudiate the extant collective bargaining agreement. To the contrary, in its May 18 letter, the Employer made it clear that it was not sure which party was the 9(a) representative of its employees and advised the parties to seek a legal determination from the Board or the courts to resolve the issue. In the meantime, the Employer has continued to maintain the status quo regarding administration of the contract, with the exception of remitting dues so as to avoid any potential liability.

Finally, the fact that UNITE HERE and the Joint Board are currently in litigation does not detract from the fact that at the time the 9(a) relationship was established and the contract was signed, the Joint Board unquestionably was acting as an agent of UNITE HERE.

In sum, the totality of the circumstances demonstrates that UNITE HERE has been, and continues to be, the exclusive Section 9(a) representative of the Employer's employees. Since UNITE HERE remains the 9(a) representative

of the Employer's bargaining unit employees, the Employer had no obligation to bargain with or remit dues to the Joint Board after the disaffiliation. Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/ B.J.K.